without reference to the particular circumstances of an individual mortgagee?

4. Is an unrestricted authority to determine, in his discretion, what premium charges are equitable, an unconstitutional delegation of legislative power to the FHA Commissioner, where Congress has not included in the statute any guide lines or limitations?

STATUTES INVOLVED

Section 603(c) of the National Housing Act (12 USC 1738(c)), in pertinent part:

> ". . . In the event that the principal obligation of any mortgage accepted for insurance under this subchapter is paid in full prior to the maturity date, the Commissioner is further authorized in his discretion to require the payment by the mortgagee of an adjusted premium charge in such amount as the Commissioner determines to be equitable . . ."

Section 607 of the National Housing Act (12 USC 1742), in pertinent part:

> "The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter."

Administrative Procedure Act of 1946 (5 USC 1001, et seq), in pertinent part:

> Par. 1003
>
> "General notice of proposed rule-making shall be published in the Federal Register * * * and shall include (1) a statement of the time, place and nature of public rule-making proceedings; (2) reference to the authority under which the rule is

proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. * * *

(b) After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose.

(c) The required publication or service of any substantive rule * * * shall be made not less than 30 days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule."

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 1

"All legislative powers herein granted shall be vested in a Congress * * * "

Article II, Section 1

"The Executive Power shall be vested in a President of the United States of America . . . ."

Article II, Section 3

" . . . He shall take Care that the Laws be faithfully executed . . . ."

Amendment 5

"No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF CASE

Petitioner is the owner of Forrest Village Apartments, a multi-family rental housing project containing 80 rental units constructed on April 26, 1949 in Philadelphia, pursuant to Section 608 of the National Housing Act (12 USC 1743), to relieve the housing shortage for veterans of World War II. The said project was financed in part with mortgages in the sum of $601,500.00 insured by the Federal Housing Administration in accordance with applicable provisions of the National Housing Act. The original mortgage was dated October 27, 1947. On February 13, 1964 said project was refinanced with a conventional mortgage in the amount of $601,432.64, and the unpaid principal in the sum of $418,917.49 on the FHA mortgage was paid in full. At the time of refinancing, the FHA insisted upon and collected from petitioner corporation a prepayment penalty in the sum of $6,015.00, representing 1% of the original face amount of the FHA-insured mortgage, without allowing petitioner a 15% credit as required by FHA regulations. From 1947 until the date of refinancing the FHA had collected from petitioner corporation a total of insurance premiums on the original mortgage of $38,751.67. Petitioner requested a waiver of said prepayment penalty under existing FHA regulations, and when said waiver was refused, paid the penalty under protest. Thereafter petitioner brought suit in the United States Court of Claims under 28 USC 1491, conferring jurisdiction of actions founded upon regulations of Executive Departments on that court. *Clapp* v. *U. S.*, 127 Ct. Cl. 505, 117 F. Supp. 576, cert. den. 348 U.S. 834 (1954).

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

Petitioner directs the court's attention to *Camellia Apts., Inc. et al* v. *U. S.*, 167 Ct. Cl. No. 224, 334 Fed. 2d 667, cited by the court below as the basis of the decision granting the government's motion for judgment on the pleadings and denying and dismissing the petitioner's motion for summary judgment in said Court. This Court denied certiorari in the Camellia case (379 U.S. 963), but on a petition which did not rely on the reasons relied on by petitioner herein. Petitioner respectfully urges that in the case at bar as in the *Camellia* case the court below arrived at a wrong interpretation and construction of the National Housing Act, contrary to the plain purpose of Congress, and contrary to a reasonable balancing of the conflicting considerations involved.

The National Housing Act (12 USC 1738(c)) provides in terms that the FHA Commissioner is:

> "Authorized in his *discretion* to require the payment by the mortgagee of an adjusted premium charge in such *amount* as the Administrator *determines* to be *equitable.*" (emph. supp.)

The statute contains three key words, i.e., "discretion", "determines" and "equitable". These are terms of art, carefully selected by Congress, carefully describing in shorthand not only the amount of any prepayment penalty that the FHA might exact from a mortgagor upon refinancing and prepayment of an FHA insured mortgage, but as well describing the administrative methods by which the FHA was to arrive at the amount of any such prepayment penalty. The first of these words, "discretion" is certainly a term which does not import unfettered discretion or arbitrary power conferred upon the FHA.

In *Puget Sound Power & Light Co.* v. *Public Utility District No. 1,* 123 Fed. 2d 286, in construing similar statutory language, it was decided:

> "* * * We think the term 'discretion' as used therein means 'legal discretion' requiring a hearing (*State* v. *Public Service Commission,* 145 T. 215, 218), and preventing arbitrary action."

In *Accardi* v. *Shaughnessy,* 347 U.S. 260, 266, 268, this Court indicated an exercise of discretion requires a hearing:

> "* * * if the word 'discretion' means anything in a statutory or administrative grant of power, it means the recipient must exercise his authority according to his own understanding and conscience. * * * the Board must * * * in arriving at its decision exercise its own independent discretion after a fair hearing * * * ."

The second key word, "determines", has also been construed by the courts, and Congress is presumed to have been aware of its judicial construction when it used it in the statute. In *Gooch Milling and Elevator Co.* v. *Commissioner of Internal Revenue,* 133 Fed. 2d 131, the United States Court of Appeals has postulated this definition, which surely has fair application in the case at bar:

> "One of the usual meanings of the word 'determine' is: to decide; adjudge; adjudicate an issue presented; to come to a decision; to perform a judicial act. *Tracy* v. *McIntyre,* 29 Calif. App. 2d 145, 84 P. 2d 526; *Glenn* v. *Mitchell,* 71 Colo. 394, 207 P. 84; in re: Talbott's Will, Misc. 38, 9 NY 2d 806. * * * The Board of Tax Appeals, as well as other administrative tribunals, is of recent origin. It functions in the twilight zone. While it is an administrative agency, Congress has con-

ferred upon it judicial, or at least quasi-judicial, authority."

The third key word in the statute, "equitable", like the other two key words, has been the subject of judicial definition, a more or less typical example of which appears in *U. S.* v. *11,360 Acres of Land,* etc., 62 Fed. Supp. 968, 970, as follows:

> "The term 'equitable' has been defined as meaning 'according to natural right or justice; marked by due consideration of what is fair, unbiased or impartial; fair; just.' *Taylor* v. *School District,* 128 Neb. 437, 259 N.W. 168, 169. Also as being 'characterized by equity or fairness; according to the principles of equity; just and right; fair; reasonable;' *Burlington Transportation Co.* v. *Iowa State Commerce Commission,* 230 Iowa 570, 298 N.W. 631, 635."

In *SEC* v. *Chenery Corporation,* 318 U.S. 80, 89, this Court recognized that a determination of equitableness must be on a case by case basis:

> "Determination of what is 'fair and equitable' calls for the application of ethical standards to particular sets of facts."

As in the *Gooch* case, *supra,* the Federal Housing Administration functions in the "twilight zone", exercising quasi-judicial authority under Section 603(c) of the National Housing Act (12 USC 1738(c) (1958)). In exercising the quasi-judicial responsibilities authorized by that section of the Act, Congress only granted to the FHA such authority as was necessary,

> "To make such rules and regulations as may be necessary to carry out the provisions of this Title." (12 USC 1742)

Petitioner herein was required to pay $6,015.00 as a prepayment penalty (1% of the original face amount of the mortgage insured by the FHA), as outlined herein in the Statement of the Case, without any administrative hearing or opportunity to be heard, as required by the *Gooch* case cited hereinabove, or the *Puget Sound Light and Power Co.* case, *supra,* both of which indicate that the words "discretion" and "determines" require an adjudication after some appropriate kind of hearing.

Instead of exacting from petitioner a 1% prepayment penalty in the sum of $6,015.00 based upon substantial evidence resulting from a specific administrative determination on the record in his case determining, in the FHA's discretion, that such prepayment penalty was "equitable" as required by the statute, the FHA required payment of the 1% adjusted premium on the basis of its Rule 64205.2b (24 CFR 282.4), which purports to impose a 1% penalty upon prepayment of any and all FHA-insured mortgages, with certain exceptions. Petitioner submits a general rule cannot possibly apply ethical standards to its particular set of facts.

One of the exceptions provides that,

> "no adjusted premium charge shall be due FHA * * * where the final maturity specified in the mortgage is accelerated solely by reason of partial prepayments made by the mortgagor which do not exceed in any one calendar year 15% of the original base amount of the mortgage."

Even if it be presumed that Congress intended that the quasi-judicial responsibilities of Sections 603(c) of the Act could, would, and should be administered

by the promulgation of a rule of general applicability instead of individual determinations on the record of equitableness in each case of proposed prepayment of an FHA-insured mortgage, petitioner in the case at bar would be entitled to a diminution of the $6,015.00 adjusted premium payment exacted from it by the FHA in the amount of 15%, or approximately $900.00, on the basis of the FHA's own regulations. This court has held that regulations promulgated by agencies are as binding on themselves as anyone else. *Service* v. *Dulles,* 354 U.S. 363; *Accardi* v. *Shaugnessy,* 347 U.S. 260. The court below wrongly decided an important question of federal law in failing to apply the rule in *Service* v. *Dulles, supra,* in petitioner's case below. Indeed, failure or refusal of the FHA to follow its own regulation not only violates this court's rule in the *Service* case, *supra,* but violates Article II, Sections 1 and 3 of the Federal Constitution, which require an executive agency to take care that the laws be faithfully executed to the same extent it imposes that constitutional duty upon the President. Moreover, such unlawful collection from petitioner of an authorized prepayment penalty is a deprivation of property without due process of law in violation of its rights under Amendment 5 to the federal Constitution.

In *Federal Radio Commission* v. *Nelson Bros.,* 289 U.S. 266, this Court has said:

> "Whether the Commission applies the legislative standards validly set up, whether it acts within authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of

> the Commission and govern its action, are appropraite questions for judicial decision. These are questions of law upon which the Court is to pass. * * * A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred."

The opinion of the court below is so erroneous and loosely drafted as to unsettle the law, and leave undecided an important question of federal law, which should be settled by this Court. As set forth hereinabove, the court below rests its decision in petitioner's case entirely on *Camellia Apartments, Inc.,* et al. v. *U. S., supra,* and thus, the *Camellia* decision through incorporation by reference, becomes the source of the difficulty. After such preliminary statements in that opinion as

> "It seems indisputable that Congress conferred upon the Commissioner the authority to make such a charge",

and

> "It is apparent on the face of the statute that the authority to demand a prepayment charge from certain mortgagees included within its scope the mortgagees that had financed plaintiff's properties",

the court below arrives at the empty conclusion

> "Under Section 603(c), the Administrator was given a broad discretion: He was permitted to charge a prepayment premium in such amount as he thought 'equitable'."

The court below ignores the procedural means by which Congress must surely have intended him to exercise that "broad discretion."

The court below seems to take the view that this is a grant by Congress of "unfettered discretion", which, if so, is *ipso facto* unconstitutional under this court's ruling in *Schechter Poultry Corporation* v. *U. S.*, 295 U.S. 495.

Petitioner respectfully submits that the court below in relying upon the *Camellia* decision arrived at a clearly erroneous interpretation of the statute with respect to the questions raised, and completely failed to come to grips with the question it imposed on itself as to whether the promulgation of a rule of general applicability under the National Housing Act met the procedural and due process requirements of the federal Constitution in giving effect to Section 603(c) of the National Housing Act requiring the FHA to make a discretionary determination of equitableness before the imposition of any prepayment penalty and as to the amount thereof, if any. This is an important question of federal law which has not been, but should be, settled by this Court. The central error of the court below stands baldly revealed in the statement in the *Camellia* decision that under the statute the FHA Commissioner

> "Was permitted to charge a prepayment premium in such amount as he *thought* 'equitable'." (emph. supp.)

This is absolutely and flatly contrary to the specific terms of the statute, which only authorizes the imposition of a prepayment penalty in such amount as the Ad-

ministrator "*determines*" to be equitable. (emph. supp.) There is all the difference in the world between the completely unfettered discretion and the wholly arbitrary character of what the Administrator might "think", as distinguished from what he might "determine", on the basis of substantial evidence and the other considerations of which Congress was mindful when it used those terms of art in the statute.

In *Schechter Poultry Corporation* v. *U. S.*, 295 U.S. 495, this Court dealt with an Act of Congress which, among other delegations of authority, authorized the President to promulgate codes of fair competition, upon a finding of no "inequitable" restrictions. In finding an unconstitutional delegation of legislative authority, this Court said:

> "* * * that legislative undertaking * * * sets up no standards, aside from the statement of the general aims * * *. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President * * * is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

If Congress did not intend that the FHA Commissioner would and should determine whether and in what amount an adjusted premium was "equitable," but authorized a general rule, then section 603(c) is just as unconstitutional as the statute condemned in the *Schecter* case, supra. If, on the other hand, Congress anticipated a determination on the record, after notice and hearing, petitioner has been denied due process. In *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143, this Court found that administrative agencies are

not free to ignore the right to a hearing on an important matter directly affecting an individual citizen, even though he might be a member of a class:

> "To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion."

As stated by this Court in *United States* v. *Realty Co.*, 163 U.S. 427,

> "The Nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice."

Petitioner respectfully submits that the decision of the court below, based as it is upon its previous decision in the *Camellia* case, completely deprived petitioner of its right to fair play from the government under Amendment 5 of the federal Constitution, as well as depriving it of its constitutional right to have the FHA follow the administrative procedures clearly set forth in Section 603(c) of the National Housing Act with respect to the equitable determination of prepayment penalties on a case by case basis.

By promulgating a rule of general applicability requiring the prepayment penalty in the sum of 1% of the original face amount of every FHA-insured mortgage conventionally refinanced, instead of following the requirements of Section 603(c) of the Act requiring customary administrative proceedings, the court below permits the violation of this Court's decision in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, which provides:

> "In the framework of our Constitution, the President's power to see that the laws are faithfully executed, refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make the laws which the President is to execute. The first section of the first Article says that
>
> "All legislative powers herein granted shall be vested in a Congress of the United States . . ."

In promulgating a rule of general applicability with respect to the 1% adjusted premium or prepayment penalty referred to in the statute, the FHA was engaged in a quasi-legislative undertaking *not* authorized by the statute. That being so, it put itself in the position of an executive agency exercising a legislative function rightfully belonging to Congress and modifying the act of Congress involved to the extent that it converted a quasi-judicial responsibility to determine what, if any, adjusted mortgage insurance premium would be equitable in a given case, to a quasi-legislative function of promulgating a rule of general applicability exacting a 1% prepayment penalty from every mortgagee refinancing an FHA-insured mortgage with the exception of certain groups or classes not relevant here.

Petitioner respectfully submits that the imposition under its rule of general applicability of the 1% prepayment penalty of the original face amount of the mortgage of petitioner herein, resulting in the payment by petitioner of $6,015.00 as an adjusted premium, is

> "* * * A finding without substantial evidence to support it—an arbitrary or capricious finding—(which) does violence to the law,"

and is the type of administrative action condemned by this court in *Federal Radio Commission* v. *Nelson Bros., supra.*

Petitioner urges upon this court that in a statute requiring the FHA to determine, in its "discretion", the equitableness of a prepayment penalty it is administratively, judicially, and constitutionally impossible to exercise such discretion reasonably and in a non-arbitrary manner, without holding some kind of administrative proceeding, to develop a basis of substantial evidence to support the exercise of discretion. *Joint Anti-Fascist League* v. *McGrath,* 341 U.S. 123; *Crosley Corp.* v. *Westinghouse,* 130 Fed. 2d 474, 475; *Puget Sound Power* v. *Public Utilities District,* 123 Fed. 2d 286, 293. Even the court below has recognized this fundamental principle in some of its decisions in other contexts:

> "A public officer in making decisions affecting the rights of citizens, is not free to act capriciously, at least until the Legislature has in plain terms granted him that arbitrary power." *Betts* v. *U. S.,* 145 Ct. Cl. 530, 535.

CONCLUSION

WHEREFORE, the premises considered, petitioner respectfully submits that on the basis of the opinion of the court below, based as it is on that court's decision in the *Camellia* case, *supra,* as measured against the statutory language of the National Housing Act, it is entitled to the grant of a writ of certiorari in ac-

cordance with the standards set forth in Rule 19 of this Court's Rules respecting the reasons justifying the grant of such writ.

Respectfully submitted,

CARL L. SHIPLEY
1204 National Press Building
Washington, D. C. 20004
Attorney for Petitioner

Of Counsel:

SHIPLEY, AKERMAN & PICKETT
1204 National Press Building
Washington, D. C. 20004

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 112-64

FORREST VILLAGE APARTMENTS, INC.

v.

THE UNITED STATES

Order

This case comes before the court on defendant's motion for judgment on the pleadings and plaintiff's motion for summary judgment. Upon consideration thereof, together with the opposition thereto, and without oral argument, on the basis of the decision by this court in *Camellia Apartments, Inc., et al.* v. *United States,* No. 344-62, decided July 17, 1964, 167 Ct. Cl. No. 224, 334 F. 2d 667,

IT IS ORDERED that defendant's motion for judgment on the pleadings be and the same is granted, plaintiff's motion for summary judgment is denied and plaintiff's petition is dismissed.

BY THE COURT

WILSON COWEN
Chief Judge